Supreme Court of the United States

October Term 1943.

No. ————.

FRANCIS E. BAUMER,

Petitioner,

vs.

FRANKLIN COUNTY DISTILLING COMPANY, INCORPORATED,

Respondent.

BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE 6TH CIRCUIT.

I.

An opinion in the above entitled cause was written by Circuit Judge Martin and concurred in by Circuit Judges Allen and Hicks and appears in the record at page 241. The Court's opinion is also reported in 135 F. (2d) 384.

II.

EVIDENCE.

A sufficient summary of the facts to present the questions involved is presented in the attached petition for Writ of Certiorari. We do state further that the evidence, while failing to show the exact amount in dollars and cents, does

show that petitioner suffered substantial damages and that now after the contract has run its course, the amount of damages could be proven with much more exactness.

III.

ARGUMENT.

The Circuit Court of Appeals Erred in Applying the Law of the State of Ohio to the Facts Presented.

In *Foard* v. *Severcool*, 1 Ohio Opinions 492; 33 N. P. N. S. 90, decided in 1933 the Ohio law relative to damages for lost profits is stated as follows:

> "A new light has been lit for us on problems such as this in the very recently published 'Restatement of the Law of Contracts' as adopted and promulgated by the American Law Institute. Attention is called to the following sections:
>
> '329. Where a right of action for breach exists, compensatory damages will be given for the net amount of the losses caused and *gains prevented* by the defendants breach, in excess of savings made possible, if established in accordance with the rules stated in Sections 330-346.
>
> '330. In awarding damages compensation is given for only those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made. If the injury is one that follows the breach in the usual course of events there is sufficient reason for the defendant to foresee it; otherwise it must be shown specifically that the defendant had reason to know the facts and to foresee the injury.
>
> '331. (1) Damages are recoverable for losses caused *or for profits and other gains prevented* by the breach only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty. * * *

> '"Losses caused" are not the only subject of damages, "gains prevented" may be the subject of compensation'.

Also in 13 Ohio Jurisprudence §§72 and 73 published in 1930, the general prevailing rule is announced as follows:

> "The general rule that absolute certainty is not required applies in this, as in other respects, and there is no doubt that recovery for profits may be allowed upon breach of a contract *if profits were in contemplation of the parties at the time the contract was made* and there is reasonable certainty that profits were in fact lost as a result of the breach." (Citing 8 Ruling Case Law p. 503, quoted herein as the correct rule.)

Substantially the same rule is followed in the case of *Queen Incubator Company* v. *The Merrill Company*, 21 Ohio Appellate Reports 482-484 wherein again the rule set forth in 8 Ruling Case Law 503 is stated.

To show that there is a strong line of distinction between uncertainty as to the amount of damages and uncertainty as to the fact of the existence of damages at all we cite the following authorities. Volume 15, American Jurisprudence p. 414 §23; American Law Institute, Restatement of the Law, §331 paragraph e.; volume 25 Corpus Juris Secundum p. 517; *Fallstaff Brewing Corporation* v. *Iowa Fruit and Produce Company*, 112 Fed. (2d) 101; *United Electrical Coal Companies* v. *Rice*, 22 Fed. 221 at p. 226.

In the case of *Story Parchment Company* v. *Paterson Parchment Paper Company*, 282 U. S. 535, 75 L. ed. 544, 51 S. Ct. 248, Mr. Justice Sutherland made the distinction contended for by petitioner as follows:

> "Juries are allowed to act upon probable and inferential as well as direct and positive proof. And when from the nature of the case, the amount of the damages can not be estimated with certainty,

or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit. * * * Rejecting the view that in such cases the jury should give only nominal, that is, in effect, no damages, leaving the injured party without redress the court said:

To deny the injured party the right to recover any actual damages in such cases because they are of a nature which cannot be thus certainly measured, would be to enable parties to profit by, and speculate upon, their own wrongs, encourage violence and invite depredation. *Such is not, and cannot be the law, though cases may be found where courts have laid down artificial and arbitrary rules which have produced such a result.* * * * And the adoption of any arbitrary rule in such a case, which will relieve the wrongdoer from any part of the damages and throw the loss upon the injured party, would be little less than legalized robbery.

Whatever of uncertainty there may be in this mode of estimating damages, is an uncertainty caused by the defendants' own wrongful act; and justice and sound public policy alike require that he should bear the risk of the uncertainty thus produced."

We respectfully urge that substantial justice has not been accomplished in this cause and that the petition for Writ of Certiorari should be sustained.

Respectfully submitted,

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Of Counsel.